

# McElroy Deutsch

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October 31, 2023

**VIA ECF**

The Honorable Tonianne J. Bongiovanni  
U.S. District Court for the District of New Jersey  
Clarkson S. Fisher Building & U.S. Courthouse  
402 East State Street  
Trenton, NJ 06808

Re: *UMG Records, Inc. et al. v. RCN Telecom Services, LLC, et al.*  
Civil Action No. 3:19-cv-17272-MAS-TJB

Dear Judge Bongiovanni,

This firm, Jenner & Block LLP, and Stein Mitchell Beato & Missner LLP jointly represent Plaintiffs in the above-referenced action. We write regarding eight documents that Defendants RCN Telecom Services, LLC *et al.* (“RCN”) refuse to produce, in contravention of this Court’s May 26, 2023 Order (ECF 247) (the “Order”).

After years of litigation, including multiple rounds of briefing and a discovery conference, the Court ordered RCN to produce 54 documents reflecting communications with third parties. *See* ECF 254 at 2 (recounting this history). On October 10, 2023, RCN filed a letter purportedly seeking “clarification” of the Order, but in fact requesting that the Court reconsider its Order as to 15 of the 54 documents. *See* ECF 253. On October 20, 2023, Plaintiffs filed a letter opposing RCN’s improper request and asking the Court to compel RCN to produce the 15 documents. *See* ECF 254.

Separate and apart from those 15 documents, Defendants produced 14 of the 54 documents with redactions, which Plaintiffs noted in their October 20 letter. *See id.* at 1 n.1.<sup>1</sup> RCN has no basis to redact these 14 documents, because the Court already held that RCN waived any privilege claim as to these documents. *See id.* At the time Plaintiffs filed their letter, Plaintiffs had raised this issue with RCN and were awaiting RCN’s response. Plaintiffs advised the Court that if RCN refused to produce the documents without redactions, Plaintiffs would have no choice but to seek additional relief from the Court. *See id.*

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<sup>1</sup> RCNPriv 2571, 2611, 2709, 2803, 2809, 2924, 2962, 2965, 2966, 2967, 2969, 2984, 2994, 3029.

# McElroy Deutsch

Hon. Tonianne J. Bongiovanni, U.S.M.J.  
October 31, 2023  
Page 2

Unfortunately – despite this Court’s prior Order and notwithstanding that RCN failed to address these documents in its October 10 letter – RCN still refuses to produce eight of these 14 documents in unredacted form. Specifically, on October 23, 2023, RCN agreed to produce six of the 14 documents in unredacted form,<sup>2</sup> but claimed the remaining eight documents should be redacted for privilege because they “were all exchanged between parties that were either current owners, board members, or managing RCN at the time.”<sup>3</sup> RCN has provided no evidentiary foundation for its claim. More to the point, RCN is not free to simply disregard this Court’s Order, which compels RCN to produce these eight documents in unredacted form.

RCN has blatantly disregarded this Court’s Order. The scope of the common interest privilege asserted by RCN in this case is an issue that was litigated at great length over a long period of time. All of the arguments RCN is raising now – as to the 15 documents for which RCN seeks reconsideration, and as to the eight documents that RCN has unilaterally redacted in violation of the Court’s Order – could have been raised when these issues were briefed previously. Further, RCN has not submitted any evidence at all in support of its claims. RCN’s refusal to produce the eight documents is yet another stalling tactic. At this point, it is clear that only a broad and unequivocal reprimand from this Court will compel RCN to comply with the Court’s Order and produce the necessary documents.

Accordingly, for all these reasons and those stated in their June 3, 2022 (ECF 224), July 13, 2022 (ECF 230), and October 20, 2023 (ECF 254) letters, Plaintiffs respectfully request that the Court compel RCN to produce unredacted versions of the eight documents at issue within seven days of the Court’s order. Further, Plaintiffs reserve the right to seek their attorneys’ fees associated with seeking this relief as a sanction for RCN’s blatant disregard for the Order of this Court.

Respectfully submitted,

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

*s/ Kathleen N. Fennelly*

KATHLEEN N. FENNELLY

cc: All counsel (via ECF and e-mail)

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<sup>2</sup> RCNPriv 2709, 2803, 2809, 2924, 2962, 2969.

<sup>3</sup> RCNPriv 2571, 2611, 2965, 2966, 2967, 2984, 2994, 3029.